

A
Duke of Athole

November 13. 1760.
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MEMORIAL

Nov. 15 60

F O R

His Majesty's ADVOCATE, in Support of his
Information ;

A G A I N S T

Murray (JAMES)^{*Drummond*} Duke of ATHOL.
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THE claim of the Noble Duke set forth, " That James Drum-
mond, late of Perth, commonly called *Duke of Perth*, and
" John Drummond his brother-german, commonly called *Lord*
" *John Drummond*, or either of them, were proprietors of the lands of
" Tomnach and Culteranoch holden by them, or either of them, of the
" Claimant, as superior of the said lands; and that the said lands were
" forfeited by the attainder of the said James and John Drummonds,
" or either of them. That, by an act made in the 1st year of King
" George I. intituled, *An act for encouraging all superiors, vassals, landlords,*
" *and tenants in Scotland, who do and shall continue in their duty and loyalty*
" *to his Majesty King George, &c.* It is enacted, That if any subject of Great
" Britain holding lands of a subject-superior in Scotland, shall be guilty
" of the treasons therein mentioned, *and shall be thereof duly convicted and*
" *attainted*, his lands or tenements held of any subject-superior in Scot-
" land, shall recognosce and return into the hands of the superior, and
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“ the property shall be consolidated with the superiority, in the same
 “ manner as if the same lands had been by the vassal resigned into the
 “ hands of the superior, *ad perpetuam remanentiam*.”

“ And therefore the Claimant prayed, that your Lordships may find
 “ and declare, that the aforesaid lands of Tomnach and Culteranoch,
 “ recognised and returned into the hands of the Claimant as superior
 “ thereof, and that the property is consolidated with the superiority.”

To this claim three several objections were offered in behalf of his Majesty's Advocate.

1st, That the claim for the Noble Duke was not entered within six months of the Record of the survey taken of this estate as forfeited to his Majesty by the attainder of John Drummond; by which attainder alone the estate was truly forfeited and vested in his Majesty.

2^{dly}, Supposing the claim duly entered, the statute of George I. founded on by the Claimant, does not support his claim; for that James Drummond, commonly called *Duke of Perth*, was vassal to the Claimant in the lands now claimed, during the whole period of the late rebellion, and for some time after; and as he was not convicted and attainted, but died a liege subject, consequently the Claimant is not intitled to the property of the lands held of him by the said James Drummond, in terms of the statute of George I.

3^{dly}, That the Claimant had not, within six months after the attainder of his vassal, obtained himself infest, and done diligence for attaining possession, and consequently the forfeiture belonged and remained to his Majesty in terms of the same statute of George I. founded on by the Claimant.

The claim and objections thereto, became the subject of a debate before Lord Minto Ordinary, who made Avisandum to your Lordships, and ordained Informations to be given in by both parties, which accordingly was done; and, upon advising these informations, your Lordships directed Memorials to be given in by both parties, upon the second objection; in obedience to which order, this Memorial is offered in behalf of his Majesty's Advocate.

The objection is fully and accurately stated in the Information for his



his Majesty's Advocate, and rests upon the clear and express words of the statute.

The statute contains a grant and privilege to superiors of an uncommon and extraordinary nature. It is intitled to a just and fair construction; but it is not intitled to an extensive construction beyond the words and intendment of the legislature.

The words are, "That if any subject of Great Britain holding lands of a subject-superior in Scotland, shall be guilty of the treasons therein mentioned, *and shall be thereof duly convicted and attainted*, his lands shall recognise and return into the hands of such superior."

Now, it is impossible that the Noble Claimant can subsume in the terms of this statute, "That James Drummond of Perth, being his vassal in the lands now claimed, was guilty of the treasons mentioned in the statute, and was thereof duly convicted and attainted." For, in fact, he never was convicted or attainted of any treason, and consequently the claim is not founded.

The Counsel for the Noble Duke says, It is notorious, that James Drummond of Perth was engaged in the rebellion 1745, and bore a principal part in it; and it would be extremely hard to deprive the Noble Duke, his superior, of the forfeiture of his rebellious vassal, in consideration of his unshaken loyalty and attachment to his Majesty's person and government.

But the answer is obvious. It may consist with our private knowledge, that James Drummond was very guilty in the rebellion 1745; but he was not convicted and attainted of that treason, as the statute founded on by the Claimant expressly requires. If he were now alive, and not convicted or attainted, it would not be competent to the Noble Duke to bring proof of his treason, to the end that he might be intitled to the benefit of this statute. The statute expressly requires, that the vassal shall be *convicted or attainted*, and no other evidence of the treason can support the superior's claim, but what is laid down in the statute itself.

Nor can the noble Duke justly complain of the hardship of being deprived of the reward of his loyalty to his late Majesty, by the accidental death of James Drummond of Perth. Loyalty to so good a prince will ever be its own reward. The whole plan of the statute is

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to give to loyal superiors the forfeiture of their vassals, which, by common law, would have accrued to the King's Majesty; and if the King was disappointed of the forfeiture by the death of his rebellious subject, before he could be attainted or convicted, surely the noble Duke cannot justly complain, that he is by that accident disappointed of what he could be intitled to, but by the conviction and attainder of his rebellious vassal.

In short, upon considering the words and intendment of the statute, it must appear to your Lordships; that no superior can be intitled to the benefit of this statute, except where the King could have been intitled by common law to the forfeiture, by the conviction and attainder of his rebellious subject; and as it is admitted in this case, that the King could not have been intitled to the forfeiture of James Drummond of Perth; because, he was not convicted and attainted, so neither can the noble Duke his superior be intitled to the benefit of this statute. There was no forfeiture in the person of James Drummond to the King; therefore, there can be no forfeiture of any part of his estate to his superior.

The Counsel for the Claimant seem sensible of the strength of this objection; and therefore, they have likewise claimed the property of these lands as forfeited to his Majesty, by the attainder of John Drummond, upon whom the succession to the estate devolved upon the death of his elder brother.

But when this claim is applied to the statute, it will appear to your Lordships to be equally ill founded with the former. The words of the statute are, "If any subject of Great Britain, holding lands of a subject-superior in Scotland, shall be guilty of the treasons here mentioned, and shall be thereof duly convicted and attainted, his lands or tenements held of such subject-superior, shall recognise and return in to the hands of the superior."

Now it is impossible for the Claimant to maintain, "that John Drummond, holding lands of the Claimant as his superior, was guilty of treason, and thereof duly convicted and attainted." He was guilty of a long continued treason, and thereof duly convicted and attainted, but

but he did not hold any lands of the Claimant during the continuance of the treason, of which he was convicted and attainted.

The statute by which he is attainted, narrates: “ That, whereas he
 “ the said John Drummond, and other rebellious subjects therein men-
 “ tioned, on or before the 18th day of April, in the year 1746, did in a
 “ traiterous and hostile manner take up arms, and levy war against his
 “ present most gracious Majesty. Be it therefore enacted: That, if the
 “ said John Drummond, &c. shall not render themselves to one of his
 “ Majesty’s Justices of Peace, on or before the 12th day of July 1746,
 “ and submit to justice for the treasons aforesaid, then every of them,
 “ not rendering himself, and submitting to justice as aforesaid, shall, from
 “ and after the said 18th day of April 1746, stand and be adjudged at-
 “ tainted of the said high treason.”

From this statute, your Lordships will perceive that the period of the treason is defined and limited to the 18th of April 1746; and upon John Drummond’s not surrendering himself to justice, he is declared attainted from that day.

And therefore, as the Claimant cannot maintain, that John Drummond was his vassal in the lands now claimed, during the continuance of the treasons of which he was attainted, that is, on or before the 18th day of April 1746, nor that he was his vassal at the time at and from which he is declared to be attainted, *viz.* the 18th day of April 1746, it is impossible your Lordships can sustain his claim.

The statute of George I. considering the relation betwixt the superior and the vassal, during the continuance of the treason and rebellion, in which either of them might be engaged; and as that relation did not subsist betwixt the Claimant and John Drummond at any period during the continuance of his treasons, nor at the time from which he is declared attainted, the Claimant cannot be intitled to the benefit of this statute.

John Drummond never was, nor could be vassal to the Claimant, in any lands. His elder brother, who was the Claimant’s vassal, lived till some time in June 1746, after the rebellion was at an end, and upon his death, the lands in question and his whole estate became forfeited to his Majesty, as from the 18th of April 1746, being the date of John

Drummond's attainder; so that there was not a possibility of his ever holding the lands in question as vassal to the Claimant. If he had surrendered before the 12th of July, he might have avoided the effect of the statutory attainder, and remained in the condition of a liege-subject, till he was convicted and attainted at common law; but by his not surrendering himself before the 12th of July, the statute had its full effect, and he became an attainted person, to all intents and purposes, from the 18th of April 1746, and every estate which devolved upon him from that date became vested in his Majesty as from that date.

If the estate of Perth, upon the death of James Drummond, had devolved upon a liege-subject, the Claimant could have had no pretence for this claim, and it is not easy to conceive upon what ground his right can be any better by the devolution of the estate to his Majesty, by the attainder of John Drummond, to whom he never stood in the relation of superior in the lands now claimed.

It is said for the Claimant, " That all that the law had in view was, " the loyalty of the superior and the disloyalty of the vassal, and that " both these concurred in this case, in a most distinguished manner; " for that the Claimant remained loyal, and that both James and John " Drummonds were disloyal."

But the fallacy of this reasoning, is extremely obvious. The law had in view to reward a superior, who remained loyal while his vassal was in rebellion, and *vice versa*; therefore, before the superior can be intitled to the benefit of the law, he must show, that the person who was his vassal, holding lands of him for the time, went into rebellion, and was thereof duly convicted and attainted. This the Claimant cannot assert with respect to his vassal James Drummond; and as for John Drummond, it has been shown that no claim lies upon his treason or attainder; because he was not the Claimant's vassal holding lands of him, neither during the rebellion, nor at the time of his attainder.

It is further argued for the Noble Claimant, " That if he had been so " unfortunate, as to have involved himself in the rebellion, and that " James and John Drummonds had remained dutiful and loyal, it can " admit of no doubt, that, upon James's death, John his brother would " have been intitled to the benefit of the Claimant's forfeiture, and to " have

“ have held these lands *in capite* of the Crown, and as the law is reciprocal, the Claimant is equally intitled to the benefit arising from the forfeiture of both, or either of these brothers.”

But, with great submission, the cases are noways parallel: for in the case supposed, there is a clear *concourse* or coincidence of the mutual qualities required by the statute, *viz.* a loyal vassal and a disloyal superior at the same time ; whereas, in the present case, these qualities did not subsist and concur together. Not betwixt the Claimant and James Drummond, because James was never convicted and attainted of treason, and died a liege-subject ; nor betwixt the Claimant and John, because John never was the Claimant's vassal ; and if the claim cannot be supported, as founded upon the treason either of James or of John separately, it is in vain to pretend that the joint treason of both can support it.

In respect whereof, &c.

T H O. M I L L E R.

28 Nov 1768

Prestonrange there is a good answer to the first objection and the third.

The second he is afraid is a good objection. If John was not even apparent heir of the vassal in rebellion.

Murkinleck the forfeiture was incurred after Lord John succeeded & he was after his succession was attainted for not surrendering himself.

But notwithstanding he thinks the objection good as the superior had no hold of Lord John as vassal during the rebellion the objection is good.

Suppose the Vassal had been a loyal subject & died before the days of attainder are run out & is succeeded by the attainted person. the Superior certainly would have as right on this act.

